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Supreme Court of the United States

October Term, 1972

72-1378

CHRISTIAN ECHOES NATIONAL MINISTRY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI SUBMITTED BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, AND JOINED IN BY THE AMERICAN BAPTIST CHURCHES, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CHURCH OF BRETHREN, THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST), LUTHERAN CHURCH IN AMERICA, THE RELIGIOUS SOCIETY OF FRIENDS, THE UNITED PRESBYTERIAN CHURCH, THE UNITED CHURCH OF CHRIST, AND THE UNITED METHODIST CHURCH AS *AMICI CURIAE*

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BRIEF *AMICUS CURIAE* BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, *ET AL.*

The *Amici* Filing This Brief

All parties have consented in writing to the filing of this brief.

The National Council of Churches and the other *amici* joining in this brief are religious organizations operating in the United States under the protection of the First Amendment, as is petitioner.

The National Council is the co-operative agency of thirty-three Protestant and Orthodox religious denomina-

tions with an aggregate membership of 42,000,000 throughout the United States. It is organized exclusively for religious purposes. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every relation of life."

On May 2, 1969, the General Board of the National Council adopted the following as part of its Policy Statement entitled "Tax Exemption of Churches":

> "Tax Exemption can be a safeguard of the free exercise of religion. In the United States it has been a basic public policy since the founding of the nation to accord to freedom of religion, speech, press and assembly a 'preferred position' at the head of the Bill of Rights. Christians support and affirm this helpful arrangement of the civil order, not solely or primarily for themselves and their churches, but for everyone. Citizens, whatever their beliefs, should likewise appreciate the policy of our society that the free exercise of religion cannot be licensed or taxed by government."

The Baptist Joint Committee on Public Affairs joins the National Council in this brief. It is the cooperative agency of eight Baptist conventions:

The American Baptist Churches in the U.S.A.,
*The Baptist General Conference,
The National Baptist Convention of America,
The National Baptist Convention, U.S.A., Inc.,
*The North American Baptist General Conference,
The Progressive National Baptist Convention, Inc.,
The Seventh Day Baptist General Conference,
*The Southern Baptist Convention,

several of which (*) are not members of the National Council of Churches, including the largest Protestant denomi-

nation in the country, the Southern Baptist Convention, with over 11,600,000 members.

Several major national religious bodies, though members of the National Council of Churches or the Baptist Joint Committee, have followed this case closely and wish to be recorded as *amici curiae* on this brief in their own right as well as being represented by the cooperative agencies described above. They include the following:

The American Baptist Churches in the U.S.A.,
The Christian Church (Disciples of Christ),
The Church of the Brethren,
The Lutheran Church in America,
The Philadelphia Yearly Meeting of the Religious Society of Friends,
The United Church of Christ,
The United Methodist Church,
The United Presbyterian Church in the U.S.A.

These denominations currently number more than 22,000,000 members in this country.

The Interest and Concern of the *Amici*

The Court below has upheld the constitutionality of the proviso contained in Section 501(c)(3) of the Internal Revenue Code of 1954, which grants tax exemption to churches and other religious organizations which qualify under its terms, namely:

> "Corporations * * * organized and operated exclusively for religious * * * purposes * * * *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation,*

and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.'' (Emphasis added)

The Court below has applied the italicized statutory limitations to petitioner despite a finding by the District Court (28a, 29a)* that it is and at all relevant times has been organized and operated exclusively for religious purposes and a concession by the Government that in all its activities, including those within the limitations, petitioner has been religiously motivated (47a). Reversing the District Court's findings and conclusions, the Court below has found that a ''substantial part'' of petitioner's religious activities fell within the proscribed area based upon the fact that appellant's publications ''* * * contained numerous Articles attempting to influence legislation by appeals to the public to react to certain issues'' (48a). The Court's opinion lists 22 such ''issues'' ranging from ''(2) work in politics at the precinct level''; through ''(9) dispel the mutual mistrust between North and South America''; and ''(11) support the Dirksen Amendment''; to ''(22) to restore our immigration laws'' (48a-49a). Immediately following this recitation of impermissible activities, the Court further found (49a):

> ''The taxpayer also attempted to mold public opinion in civil rights legislation, medicare, the Postage Revision Act of 1967, the Honest Election Law of 1967, the Nuclear Test Ban Treaty, the Panama Canal Treaty, firearms control legislation, and the Outer Space Treaty. These appeals urging the readers to action all appeared in Christian Echoes' publications between 1961 and 1968. They were all attempts to in-

* References are to Petitioner's Appendix.

fluence legislation through an indirect campaign to mold public opinion."

Accordingly, the Court below has sustained the removal of petitioner's tax exemption by the Internal Revenue Service. As a result, appellant's income, including donations, has been subject to federal income taxes imposed retroactively to tax year 1961.*

These *amici* do not necessarily agree with all, or even most, of petitioner's views upon public questions, the expression of which has cost it its tax exemption. But they strongly oppose the limitations of Section 501(c)(3) which, as interpreted and applied below, permit a wholesale audit of all the activities of religious organizations and limit tax exemption to those religious organizations willing to restrict the exercise of their First Amendment rights in expressing their views on public questions, even though based upon religious conviction.

As so applied, Section 501(c)(3) permits gross entanglement of the Internal Revenue Service in church affairs, and favors (and thus tends to establish) religious organizations which by doctrine or tradition remain aloof from public questions. But of greatest concern is the chilling effect

* The Court below also referred to instances in which Christian Echoes had "intervened in political campaigns," including one instance in 1964 in which "the annual convention endorsed Senator Barry Goldwater." (In point of fact there was no such endorsement; Reverend Hargis did however express his personal preference in 1964 for Senator Goldwater [Petitioner's Brief for Certiorari at 15].) In any event, the 1964 "endorsement" had no effect on Christian Echoes pre-1964 tax liability; the decision of the Court below to uphold the imposition of taxes retroactively to 1961 rested entirely on its determination that Christian Echoes had failed to disclose its "substantial involvement in activities aimed at influencing legislation." (55a)

of these statutory restrictions upon the most fundamental rights of all citizens—freedom of speech and of the press, and the right to petition the government—which is compounded here by the even more profound threat to the free exercise of religion by churches to whom loss of federal tax exemption could prove disastrous.

American churches and religious organizations have traditionally participated vigorously and extensively in the debates on the great public questions of the day—from independence to slavery, from civil rights to abortion to peace in Viet Nam—not as political entities but precisely in fulfillment of what they have deemed to be the witness of their religious convictions. We submit that challenge to power from the pulpit has been one of the deepest sources of our national strength. As President Kennedy put it:

> "The men who create power make an indispensable contribution to the nation's greatness. But the men who question power make a contribution just as indispensable, especially when that questioning is disinterested.
>
> "For they determine whether we use power or power uses us. Our national strength matters; but the spirit which informs and controls our strength matters just as much."

Despite these activities, churches have always been, since the beginning of the republic and before, exempt from property and other state taxes without any restrictions on their religious activities. Until now, the Internal Revenue Service has wisely refrained from using the Section 501(c)(3) restrictions to deprive a religious organization of its tax exemption.

These *amici* respectfully urge that the Petition for Writ of Certiorari be granted on the ground that this case presents important questions of first impression, namely:

Questions Presented

1. Are the Section 501(c)(3) limitations on tax exemption, as applied to religious organizations, valid under the Free Exercise of Religion, Establishment of Religion, Free Speech, and Freedom of Petition Clauses of the First Amendment?

The Court below answered in the affirmative: "We hold that the limitations imposed by Congress in Section 501 (c)(3) are constitutionally valid" (52a).

2. Even if it is assumed that Section 501(c)(3) type limitations on tax exemption, as applied to religious organizations, are permissible, are these limitations in their present form void for vagueness and overbreadth?

The Court below answered in the negative.

3. Even if the Section 501(c)(3) limitations on tax exemption, as applied to religious organizations, are valid on their face, are they unconstitutional as construed and applied by the Court below and by the Internal Revenue Service?

POINT 1

The Section 501(c)(3) limitations on tax exemption, as applied to religious organizations, invalidly restrain the rights of such organizations under the free exercise of religion, establishment of religion, free speech, and freedom of petition clause of the First Amendment.

Neither petitioner nor respondent challenges the constitutionality of the grant of tax exempt status to religious organizations made by Congress in Section 501(c)(3). What is being challenged in this case, for the first time, are those provisions of Section 501(c)(3) that make religious organizations, whose religious activities may directly or indirectly "influence legislation", subject to taxation.* These provisions are invalid under the First Amendment in that they: a—jeopardize organized religions' rights to the free exercise of religion and the free exercise of speech, by making the sacrifice of these rights a condition for tax exemption eligibility; b—establish those religions that refrain from becoming involved in issues of public concern in a preferred position thereby destroying government neutrality among religions, and c—necessitate excessive surveillance and entanglement by the government in the affairs of organized religion.

a. The Court below recognized that the effect of Section 501(c)(3) on religious organizations was to restrain their rights to both the free exercise of religion and (by impli-

* By contrast, business organizations which conduct direct lobbying activities in favor of legislation of interest to them are permitted by the Internal Revenue Code to deduct the entire cost of such activities. 26 U.S.C. §162(e)(1).

cation) to the free exercise of speech (52a). The Court nevertheless held that there was no constitutional bar to the provisions of Section 501(c)(3) which made the privilege of tax exemption conditional on a religion's willingness to submit to a curtailment of its First Amendment rights. This is not the first time that this Court has been presented with an attempt to make government benefits conditional on the sacrifice of First Amendment rights. In *Sherbert v. Verner*, 374 U.S. 398 (1963), it was held that a person could not be denied unemployment benefits for refusing to work on Saturday, when such refusal was based on religious belief. In the following language this Court held that such a denial of benefits would unconstitutionally burden the appellant's right to the free exercise of religion, even though appellant had no "right" to the benefit denied.

> "We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does." 374 U.S. at 403.
>
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> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."* *Id.* at 404.

* In a footnote, this Court cited the following cases as examples of situations in which "conditions and qualifications upon governmental privileges and benefits [were] invalidated because of their tendency to inhibit constitutionally protected activity": *Steinberg* v. *United States*, 163 F.Supp. 590 (Ct. Cl. 1958) (annuity to a government employee cannot be denied because he has availed himself

(footnote continued on next page)

In *Sherbert* strong reliance was placed on the case of *Speiser* v. *Randall*, 357 U.S. 513 (1958), which involved an attempt to make an individual's tax exemption conditional on his affirmation of loyalty to the government. As stated in *Sherbert*:

> "In Speiser v. Randall, * * * we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an

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of his Fifth Amendment rights); *Syrek* v. *California Unemployment Ins. Board*, 54 Cal.2d 519, 354 P.2d 625 (1960) (unemployment insurance could not be denied to a person who refused to accept civil service job because of a loyalty oath requirement he felt objectionable); *Fino* v. *Maryland Employment Security Board*, 218 Md. 504, 147 A.2d 1738 (1959) (a person fired for asserting his Fifth Amendment rights cannot be denied unemployment insurance); *Chicago Housing Authority* v. *Blackman*, 4 Ill.2d 319, 122 N.E.2d 522 (1954) (tenants in public housing cannot be evicted because they refuse to sign loyalty oaths and to execute statements of nonmembership in subversive organizations); *Housing Authority of Los Angeles* v. *Cordova*, 130 Cal.App.2d Supp. 883, 279 P.2d 215 (1955) (tenancy in public housing cannot be made conditional on the signing of a statement of nonmembership in subversive organizations); *Lawson* v. *Housing Authority of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605 (1955) (tenancy in public housing cannot be made conditional on the signing of a statement of nonmembership in subversive organizations); *Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946) (state under no obligation to permit use of schools for public meetings; however, when it decides to permit such use, it may not require proof of nonsubversiveness as a condition for use of schools); *American Civil Liberties Union* v. *Board of Education*, 55 Cal.2d 167, 359 P.2d 45 (1961) (state cannot require those seeking to use schools for public meetings to submit a statement that they will not advocate violent overthrow of government at meeting); *City of Baltimore* v. *A. S. Abell Co.*, 218 Md. 273, 145 A.2d 111 (1958) (advertising media tax that was specifically directed at newspapers, radio and television unconstitutionally infringed First Amendment rights).

exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to 'produce a result which the State could not command directly,' 357 U.S., at 526, 78 S.Ct., at 1342. 'To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.' Id., 357 U.S., at 518, 78 S.Ct., at 1338." 374 U.S. at 405-406.

In *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), it was held that a fixed-sum license tax on door-to-door sellers could not constitutionally be applied to a person who sold religious literature as part of his mission of preaching and publicizing his religion:

> "The tax imposed by the City of Jeannette is a flat license tax, the payment of which is *a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.* Magnano Co. v. Hamilton, 292 U.S. 40, 44-45, and cases cited." 319 U.S. at 112 (emphasis added).
>
> • • •
>
> "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Id.* at 113.

The same reasoning in *Murdock* was again used by this Court to strike down the imposition of a fixed-sum license tax on those engaged in the practice of preaching door-to-door in the case of *Follett* v. *McCormick,* 321 U.S. 573 (1944):

> "The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First

Amendment is as obnoxious (Grosjean v. American Press Co., supra; Murdock v. Pennsylvania, supra) as the imposition of a censorship or a previous restraint. Near v. Minnesota, 283 U.S. 697. For, to repeat, 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.' Murdock v. Pennsylvania, supra, p. 112." 321 U.S. at 577.

* * *

"But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." *Id.* at 578.

The Court below, in its handling of the Christian Echoes appeal, not only ignored the above cases, but proceeded to make three conclusions with respect to religious tax exemptions that directly contradict the findings of this Court in the recent case of *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664 (1970). First, the Court below stated that religious tax exemption rests on a recognition of the social service role played by religion (46a); this position was rejected by this Court in *Walz,* 397 U.S. at 674. The Court below also treats religious tax exemption as a subsidy (46a, 53a), which is a position specifically rejected in *Walz,* 397 U.S. at 675-76. Finally, the Court below treats the participation by religious organizations in public affairs not as a full right under the First Amendment, but instead as a threat to the wall separating church and state that may be properly subjected to restraints and limitations (52a). This Court, in *Walz,* however, treated such activity as not only proper, but as a right:

"Adherents of particular faiths and individual churches frequently take strong positions on public

issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." 397 U.S. at 670.

Considering, then, that the Court below erroneously viewed religions as social service institutions which were publicly subsidized by tax exemption, and which should be discouraged from participating in public affairs, it is not difficult to understand how the First Amendment restraints of Section 501(c)(3) were upheld as "in keeping with an overwhelming and compelling Governmental interest" (52a). However, the fact is that the "overwhelming and compelling Governmental interest" (separation of church and state) referred to by the Court is not served, but is, in fact, hindered by the First Amendment restraints of Section 501(c)(3) and for this reason the restraints cannot be upheld. As this Court stated in the very recent case of *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972):

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

It should be noted that in the opinion of the Court below there is but a single reference to a case involving an interpretation of the First Amendment religion clauses. The case referred to, *Dickinson* v. *United States*, 346 U.S. 389 (1953), held that ministerial exemption from compulsory military service is a matter of legislative grace. The Court below based its holding mainly on two "Hatch Acts" cases, which it found to involve issues clearly parallel to those

involved in Christian Echoes (52a). In the two cases cited by the Court, *United Public Workers of America (C.I.O.)* v. *Mitchell,* 330 U.S. 75 (1947), and *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127 (1947), the constitutionality of the Hatch Act was upheld against claims that its provisions prohibiting "certain" political activities by government employees were invalid, in that they deprived the employees of their First Amendment right to free exercise of speech. However, the Hatch Act has very recently been held unconstitutional by a three-judge district court in *National Association of Letter Carriers* v. *United States Civil Service Commission,* 346 F. Supp. 578 (D.D.C. 1972). The decision is now on appeal to this Court and argument of the appeal was heard in late March.

The Hatch Act cases relied on by the Court below are not only of questionable validity, in light of the *National Letter Carriers* case, but they are clearly distinguishable from the Christian Echoes case in two material respects: First, the Hatch Act cases did not involve any claims under the Religion Clauses of the First Amendment; and second, the Hatch Act cases involved an arguably valid public goal (political neutrality of government employees), while the Christian Echoes case involves a goal under Section 501 (c)(3) that is clearly not a valid public goal (political neutrality of religious organizations).

b. The First Amendment prohibits any effort by the government to place one religion or group of religions in a favored position over other religions. The approved attitude by government toward religion in this country has been one of tolerance and neutrality; laws which "prefer

one religion over another" are prohibited. *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947). The government is neutral as between religious opinions and "disparages none". *Abington School District* v. *Schempp,* 374 U.S. 203, 215 (1963). This attitude was summarized by this Court in the case of *Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952):

> "We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to anyone group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."

In *Walz,* an ideal of "benevolent neutrality" was described (397 U.S. at 669):

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

The effect of the challenged provisions of Section 501(c)(3) is directly contrary to the standards of government neutrality towards and among various religions required by the First Amendment.

The challenged provisions of Section 501(c)(3) carve out as a separate category those religious organizations deemed too active in issues of public concern, and subjects

only them to the weight of government taxation. The number of religious organizations that at various times in our history might have been considered to have devoted a substantial part of their time to "carrying on propaganda, or otherwise attempting, to influence legislation" is considerable. From the beginning of this nation (and, of course, earlier), churches have been working corporately for public-policy objectives which were central to their faith. New England clergy and congregations—as well as Presbyterian, Baptist and others in the other colonies—were instrumental in preaching independence prior to the American Revolution. The incessant work of the churches to abolish the slave trade and subsequently to end slavery itself was a salient feature of church life in the United States up through the Civil War (by which time there were vehement religious advocates on *both* sides of the slavery issue!). Whatever one's evaluation of prohibition, it was achieved by an intensive "moral" crusade on the part of churches and related organizations. Opposition to gambling, divorce, prostitution, birth control, abortion, desecration of the Sabbath, as well as support for child-labor laws, public education, desegregation laws, civil rights laws, etc., have marked the public activity of the major churches of the U.S. throughout its history and without any revocation of their tax exemptions. 2 Stokes, *Church and State in the United States*, Ch. 14-16 (1950).

At the same time it must be recognized that there are other religious groups whose beliefs are such that they have felt obliged to scrupulously avoid involvement and activity of any kind in debate on public questions. Such an organization would be the Amish, whose beliefs were recent-

ly reviewed by this Court in *Yoder*. Whatever the relative merits between those religions whose sincere beliefs make them publicly active and those religions whose sincere beliefs make them avoid public issues, a government committed to religious neutrality under the First Amendment cannot use its taxing power (or any other power) to favor one group of religions over the other. There is no instance of a state or local religious property tax exemption (such as that involved in *Walz*) being conditioned on the degree of public activity a religious group engages in. Indeed, prior to 1934 there is no instance of a federal tax exemption being so conditioned.

The Court below upheld the 1934 and 1954 restraints on religious tax exemption contained in Section 501(c)(3) as "in keeping with an overwhelming and compelling governmental interest: that of guarantying that the wall separating church and state remain high and firm" (52a). The Court below wrongly assumes that church and state should by their very nature occupy separate spheres of interest, when in fact the converse is true. As already noted, when great moral issues face the country, church and state will inevitably both become involved; the state will act through legislation and through its elected officials, while churches will act through the pulpit, church publications and otherwise to influence their members and others, precisely as appellant did here. The objective of the First Amendment is not to prevent church and state from both becoming involved in particular issues having both a moral and a political content. Rather the objective is to prevent, as far as possible, the intrusion of either into the exclusive precincts of the other. *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971).

Ironically, the restraints in Section 501(c)(3) upheld by the Court below have the potential of seriously weakening if not destroying the wall between church and state. These restraints elevate to a preferred status those religions which refrain from participation in moral issues of public concern, and represent a value judgment by the government on what the true function of a religion and its ministry should be. Under these restraints, a religious organization such as the Quakers could, after hundreds of years of spreading its doctrine of peace and nonviolence, suddenly find itself subject to governmental surveillance and eventual taxation merely because its doctrine had become the subject of political controversy. The prospect of the government deciding what should or should not be legitimate areas for religious concern and activity cannot be reconciled with the First Amendment requirement of government neutrality. The statement by the Court below that the restraining effect in Section 501(c)(3) on the Free Exercise Clause of the First Amendment helps to promote the separation of church and state (52a) represents a serious misunderstanding of the meaning of the First Amendment. At best, the Court below has treated the First Amendment Establishment and Free Exercise of Religion clauses as separate and distinct (a position rejected by this Court in *Walz*), and has then proceeded to sanction a scheme that "promotes" the purpose of one clause (Establishment) at the expense of the other clause (Free Exercise of Religion).

c. This Court has already held that though tax exemptions to religious organizations confer an indirect economic benefit, they are still permissible under the Religion Clauses of the First Amendment. *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 675 (1970).

"Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."

Under *Walz*, one of the chief First Amendment criteria to be used in evaluating either a taxation or exemption scheme for religious organizations is to determine the degree to which such a scheme makes necessary a deep and continuing involvement by the government in the affairs of such religious organizations. With respect to the challenged provisions of Section 501(c)(3), it is clear that only by the most extensive surveillance can the government properly evaluate the religious activities of an organization to determine if (i) a substantial part of its activities involved "carrying on propaganda, or otherwise attempting to influence legislation" or (ii) if its activities involved participating in, or intervening in "any political campaign on behalf of any candidate for public office." An examination of the record before this Court indicates that the activities of Christian Echoes for the years 1961 through 1968 were subject to thorough government investigation. Numerous sermons, magazines, pamphlets, documents, broadcasts, and other written and spoken material were reviewed and analyzed. The intense investigation by the government of Christian Echoes' religious activities in order to evaluate their possible "political" significance was upheld as proper by the Court below under Section 501(c)(3). The contention of Christian Echoes that all of

its investigated activities were religiously motivated, which is conceded by the Government and by the Court of Appeals in no way protected Christian Echoes from the Government surveillance and eventual taxation described above:

> "A religious organization that engages in substantial activity aimed at influencing legislation is disqualified from tax exemption, whatever the motivation. The Government has at all times recognized Christian Echoes as a religious organization. Indeed, the Government acknowledges that in all of its activities, Christian Echoes has been religiously motivated." (47a).

The Government entanglement and intrusion into the religious affairs of Christian Echoes, which occurred as a result of the challenged provisions of Section 501(c)(3), was of such a degree as to seriously violate the requirements of the Religion Clauses of the First Amendment. This Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), struck down the practice of granting supplemental state payments to teachers of strictly secular subjects in nonpublic (including religious) schools because such payments would have necessitated excessive government entanglement and surveillance over the activities of religious organizations. The prospect of government evaluation of the secular orientation of the teaching activities and financial records of religious schools was seen as clearly impermissible. To quote (p. 620):

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids."

And again (pp. 621-622):

> "In particular the government's post audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state."

Similarly, the challenged provisions of Section 501(c)(3) necessitate the sort of "intimate and continuing" governmental surveillance over religious organizations that the First Amendment was designed to prohibit.

POINT 2

Even if it is assumed that Section 501(c)(3) type limitations on tax exemption, as applied to religious organizations, are permissible, the limitations in their present form are void for vagueness and overbreadth.

Under Section 501(c)(3), a tax exempt religious organization is stated to be one "no *substantial* part of the *activities* of which is *carrying on propaganda*, or *otherwise attempting*, to *influence legislation*, and which does not *participate in* (including the publishing or distributing of *statements*), any political campaign *on behalf* of any candidate for public office." [Emphasis added] Each of the terms scored is one which could be subject to a variety of interpretations. The term *substantial* is not defined anywhere in Section 501(c)(3), nor is it defined in the Treasury Regulations applicable to Section 501(c)(3). The Court below stated that in order to determine whether activities are *substantial*, "[t]he political activities of an organization must be balanced in the context of the objectives and

circumstances of the organization." (49a, 50a). The Court below made no further attempt to define *substantial* except to reject a percentage test as inadequate to handle the "complexity" of the issue (50a).

The vagueness of the meaning of the term substantial in Section 501(c)(3) is evidenced by the case of *Americans United, Inc.* v. *Walters*, 73-1 USTC ¶9165 (D.C. Cir. 1973), which held that a claim that the term *substantial* was unconstitutionally discriminatory (it was argued that the same amount of activity considered substantial for a small organization might be considered insubstantial for a large organization) was sufficient to merit a hearing before a three-judge panel. The meaning of the terms *activities* and *carrying on propaganda* are even less clear. There is no indication whether *activities* are to be measured quantitatively (the number of people contacted, dollars expended, hours spent, etc.) or qualitatively (the moral energy and impact involved in given acts). *Carrying on propaganda* could cover almost anything. A Sunday sermon given by a pastor to his congregation involving a topic of profound belief might easily qualify as "carrying on propaganda" to an outside government agent. Also unclear is what is meant by the terms "*otherwise attempting* to *influence* legislation." A pastor might deliver an impassioned sermon on the importance of the New Testament commandment to "Love thy neighbor as thyself," and conclude by urging his members to do everything in their power to make this commandment a reality. At the same time, either Congress or a local legislature might be considering bills dealing with such diverse topics as civil rights, defense spending, capital punishment, aid to the

poor, etc. It could be argued that the pastor's stirring sermon was an attempt to influence any or all of the above bills.

Finally, the phrase "*participate* in (including the publishing or distributing of *statements*), any political campaign on *behalf* of any candidate", though somewhat clearer than those already discussed, still leaves much doubt as to its meaning. For instance, if a "one issue" candidate for the state legislature campaigns for stiffer drug laws, does a religious organization *participate* on his *behalf* by urging its members to do all they can to help fight drug abuse in society?

The net effect of the challenged limitations in Section 501 (c)(3) is that a religious organization is left with virtually no guidelines as to what conduct it can engage in. Each time a pastor delivers a sermon, distributes a pamphlet, or meets with his congregation he must measure his conduct against an unknown standard. Every time an organization's religious activities involve issues of public concern, there is a threat of government revocation of tax exemption. The only wise course for such organizations to take would be to refrain as much as possible from becoming involved in public life at all. If actively enforced, the chilling effect that the challenged provisions of Section 501(c)(3) could have on the First Amendment rights of religious organizations in this country would be far beyond anything so far permitted. The language used by this Court in striking down a teacher's loyalty oath for vagueness in the case of *Keyishian* v. *Board of Regents of University of State of New York*, 385 U.S. 589, 603-604 (1967), is particularly applicable:

"We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' * * * '[f]or standards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' * * * When one must guess what conduct or utterance may lose him his position one necessarily will 'steer far wider of the unlawful zone * * *' * * * For '[t]he threat of sanctions may deter * * * almost as potently as the actual application of sanctions.' * * * The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. * * *"

"The regulatory maze created by New York is wholly lacking in 'terms susceptible of objective measurement.' * * * It has the quality of 'extraordinary ambiguity' * * * '[M]en of common intelligence must necessarily guess at its meaning and differ as to its application. * * *'"

The challenged limitations of Section 501(c)(3), which have been interpreted differently by the District Court, the Internal Revenue Service, and the Court below, have the same quality of "extraordinary ambiguity" which this Court has consistently condemned in laws affecting First Amendment rights.

POINT 3

Even if the Section 501(c)(3) limitations on tax exemptions, as applied to religious organizations, are valid on their face, they are unconstitutional as construed and applied by the Court below and by the Internal Revenue Service.

The challenged limitations of Section 501(c)(3) could be construed in such a way as to preserve their constitutionality. Thus, as this Court has already found in *United States v. Christian Echoes Ministry* (38a), the Federal District Court that first heard this case construed Section 501(c)(3) in such a way as to avoid constitutional problems under the First Amendment:

> "The court avoided holding that the section itself was unconstitutional 'as applied'—*i.e.*, that the section, by its own terms, infringed constitutional freedoms in the circumstances of the particular case. Rather, it held that the Service had misinterpreted §501(c)(3) and that the section must be narrowly construed. Although the construction was based on a constitutional premise, it did not amount to a holding that an Act of Congress is unconstitutional, as contemplated by §1252. To the contrary, the District Court construed the section so as to save its constitutionality."

The narrow construction given by the District Court to Section 501(c)(3) enabled it to reject the government's surveillance and analysis of Christian Echoes activities as the product of a misinterpretation of Section 501(c)(3).

The Court held that under Section 501(c)(3) the activity of a concededly religious organization could not be studied

for its "religious" or "non-religious" character. It must be admitted that the construction given to Section 501(c)(3) by the District Court, would, if accepted, avoid the constitutional challenges presented in Points 1 and 2 of this brief. However, the same cannot be said about the construction given to Section 501(c)(3) by either the Internal Revenue or by the Court below. Instead of narrowly construing Section 501(c)(3) to avoid constitutional problems under the First Amendment, the Internal Revenue and the Court below have adopted broad constructions that go far beyond the language contained in Section 501(c)(3).

The Treasury Regulations construing Section 501(c)(3) define an organization substantially active in advocating the adoption or rejection of legislation as an "action" organization (§1.501[c][3]-1[c][3][ii][b]), and categorically state that such an organization cannot be considered to be operating exclusively for religious purposes (§1.501[c][3]-1[c][3][i]). This construction precludes any possibility of reading Section 501(c)(3) narrowly for constitutional purposes, as did the District Court. Further, the Regulations expand the Section 501(c)(3) prohibition against activity on behalf of political candidates to include activity in opposition to a candidate. (§1.501[c][3]-1[c][3][iii]). Thus, if a church urged its members to oppose the political candidacy of members of the American Nazi Party, it could be subject under the Treasury Regulations to a revocation of its tax exemption.

The Treasury Regulations are so vague and imprecise as to grant the Internal Revenue Service virtually unlimited power to remove a church's tax exemption. A church

such as Christian Echoes that loses its tax exemption has little effective legal recourse; it must pay taxes with only the hope that years later it may succeed in recovering them in court. Even more devastating is the fact that the right of the church's members to deduct their contributions ceases. Even if the church later succeeds in having its exempt status restored, there will still have been a period of many years during which its members will have been denied the right to make tax free contributions. The Treasury Regulations covering Section 501(c)(3) fail to provide churches with the sort of guidelines on which they can rely and act in confidence. The chilling effect that such vague regulations can have on the conduct of churches is made particularly acute by the fact that the continued existence of many churches depends on compliance with these regulations.

In construing Section 501(c)(3) and the applicable Treasury Regulations, the Court below decided that "Congress intended the limitations be given a broad or liberal interpretation" (48a). The Court concluded that the "substantial * * * activities * * * to influence legislation" provision of Section 501(c)(3) was meant to include "direct and indirect appeals to legislators and the public in general." (*Id.*). The Court held that "attempts to influence public opinion", even when they did not mention specific legislation, could be considered as "attempts to influence legislation" (47a).

Though the Court below found that Christian Echoes engaged in activities to promote desirable governmental policies through legislation, it also found that such activities

were not in any way peripheral to Christian Echoes religious purposes, but rather were "[a]n essential part of the program of Christian Echoes * * * [and] consistent with its objectives" (50a). Since it is conceded that the motive and object of all the activities in the Christian Echoes program is religious (47a), it is submitted that the District Court's construction of Section 501(c)(3) as barring further inquiring into the nature of such religious activities is a proper one:

> "The activities of plaintiff are singularly motivated by the sincere religious conviction of plaintiff's followers. The Court having found as fact that plaintiff through its followers believes in the religious nature of its activities, neither defendant nor this Court may inquire into such activities and work product of plaintiff for the purpose of determining whether those activities claimed by plaintiff to be religious are religious or political and, if political, whether substantial, for the purpose of denying tax exempt status to plaintiff." (30a).

As this Court has already stated, the construction given to Section 501(c)(3) by the District Court "save[s] its constitutionality." (38a). We submit that at a minimum, this Court should grant certiorari in order to review the conflicting constructions of Section 501(c)(3) given by the courts below.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition of Christian Echoes National Ministry, Inc. for a writ of certiorari should be granted.

Respectfully submitted,

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